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## Chapter 23. Title

**23.0.0. Passage of Title.** When does title to the goods pass from the seller to the buyer? Under real property law, there is a “unitary” concept under which an entire bundle of rights passes at the same time. For example, title, risk of loss, and possessory rights all transfer at a single moment in time, when the deed is delivered from the seller to the buyer. In a departure from real property law, when it comes to goods, different rights can pass at different times. For example, risk of loss can pass from buyer to seller before the buyer acquires title or possession of the goods. Rules governing the passage of title are found at UCC § 2-401.

### 23.0.1. UCC on Passing of Title

The Uniform Commercial Code:

#### § 2-401. Passing of Title; Reservation for Security; Limited Application of This Section.

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a

security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale".

### **23.1. Operation of Passage of Title**

Note that § 2-401(1) provides that “[a]ny retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.” You will see the significance of this concept when you study UCC Article 9. For example, I sell you my titled automobile on credit, and we provide in our agreement that I will withhold title until you have paid in full. In fact, I have sold the car to you. Recall that § 2-106(1) provides that a sale “consists in the passing of title from the seller to the buyer for a price. (§ 2-401).”

Therefore, you have title to the car (even though you do not have the title document) and I have a security interest in the car – the right to repossess it if you default in payment.

23.1.1. First look for an agreement of the parties as to when title passes. For example, purchase orders often contain a clause indicating when title to the goods passes from seller to buyer. In addition, consider terms that may be added by usage of trade, course of dealing, and course of performance.

23.1.2. Under § 2-401(1), title cannot pass before identification of the goods has occurred.

23.1.3. Absent specific agreement otherwise, § 2-401(2) provides the default rules:

- For a *shipment contract*, title passes at time and place of shipment.
- For a *destination contract*, title passes upon tender of goods to buyer when the goods are tendered at the stated destination.
- For contracts not involving common carriers, title passes when the seller has performed his obligation to deliver, as determined by the contract.

23.1.4. Note that under § 2-401(4), if a buyer rejects non-conforming goods, or otherwise refuses the goods (whether justified or unjustified), title reverts in the seller.

### **23.1A. UCC on Power to Transfer Title**

UCC §2-403 includes a variety of important provisions covered over the rest of this chapter, and it can create some eye-opening results. The Uniform Commercial Code:

§ 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting".

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

**23.2. Transferor's Title.** Section 2-403 provides that a *purchaser* of goods acquires all of the title of transferor, unless by agreement the purchaser acquires less than the whole (such as an undivided one-half interest, or a leasehold interest). The term "purchaser," as used here, includes donees. See § 1-201(b)(29). In other words, the transferee receives whatever title the transferor has. If the transferor has good title, the transferee will acquire good title. Similarly, if the transferor has something other than good title, the general rule of § 2-403 is that the transferee inherits the transferor's title problems.

23.2.1. As we studied in an earlier chapter, unless specifically and validly disclaimed, the seller (whether merchant or non-merchant) warrants that the title conveyed is good, the transfer is rightful, and the goods are delivered free from any security interest or other lien, except for those security interests or liens known by the buyer at the time of contracting. UCC § 2-312.

23.2.2. Thus, the purchaser always has a breach of warranty claim against the seller if it turns out that the seller breaches this warranty. For example, if a seller sells a stolen watch to the buyer, the buyer can recover from the seller. But what if the seller has disappeared to Costa Rica? What are the rights of the purchaser of the watch, who paid good money for a stolen watch, and the person from whom the watch was stolen? Section 2-403 addresses the rights of a purchaser versus the rights of third parties who claim a right to the purchased goods.

23.2.3. There are three types of title which we will study: *good title*, *voidable title*, and *void title*.

**23.3. Good Title.** The concept of "good title" (not a defined term) has developed in the real property context. It has been defined as a title "free from litigation, palpable defects and grave doubts, comprising both legal and equitable titles, and fairly deducible of record." *First Montana Title Co. v. North Point Square Assoc.*, 782

P.2d 376, 379 (Mont. 1989). Good title is a title free from all liens, encumbrances, and claims of third parties. It vests full rights of ownership in the owner (unless the transferee acquires a partial interest, such as an undivided one-half interest).

**23.4. Voidable Title.** The second sentence of § 2-403 addresses the concept of *voidable title*, and lists a *nonexclusive* list of situations giving rise to voidable title. When a person with voidable title transfers to a *good faith purchaser for value*, the transferor's "voidable title" becomes "good title" in the hands of the purchaser.

23.4.1. If a transferee of property acquires "voidable title," the transferor has a right to recover the goods from the transferee. For example, if a purchaser buys a new car, and the check bounces, the purchaser has acquired "voidable title," and as against the purchaser, the seller has superior rights. But once the transferee, in turn, transfers the goods to a good faith purchaser for value, the new transferee acquires good title, and the original transferor's right to recover the goods is cut off. UCC § 2-403(1)(a)-(d) includes a list of situations where a transferee of goods acquires "voidable title."

- a. The transferor was deceived as to the identity of the purchaser;
- b. The goods were delivered in exchange for a check which later is dishonored;
- c. It was agreed that the transaction was to be a "cash sale;"
- d. The delivery was procured through fraud punishable as larcenous under the criminal law, such as theft by trickery, where the transferor voluntarily relinquishes goods, but has been tricked (versus theft, where goods are taken without participation by the transferor).

Note that this list is non-exclusive. As you recall from your contracts class, other instances where a transferee acquires voidable title include purchase from a minor or a person later claiming mental incompetence.

**23.5. Void Title.** In contrast to voidable title, which can morph into good title when the goods have subsequently been transferred to a good faith purchaser for value, *void title is always void*. Where title is void, the rightful owner will prevail against someone who has acquired the goods down the line, even if the current owner was a good faith purchaser for value. Recall your contracts class, for example, that contracts entered into by a person whose mental incapacity has been judicially determined are void. Note, however, that the statute of limitations might bar the rightful owner's claim against the purchaser. An example is the defense mounted by museums against the claimants of art works that were stolen during World War II.

**23.5A.0. Case: *Inmi-Etti v. Aluisi***

This case explores void title versus voidable title under §2-403.

## **Inmi-Etti v. Aluisi**

Court of Special Appeals of Maryland

May 20, 1985

ADEORIKE OGUNSANYA DUROS INMI-ETTI v. JANES V. ALUISI, ET AL. No. 1264, September Term, 1984. 492 A.2d 917, 63 Md. App. 293 (Md. Ct. Spec. App. 1985) Argued before GARRITY, GETTY and KARWACKI, JJ.

### **Background:**

Inmi-Etti, while visiting in the United States, decided to buy a car and have it shipped back to Nigeria. With the aid of an acquaintance, Butler, she placed an order for a new 1981 Honda Prelude with Wilson Pontiac for a purchase price of \$ 8,500. After making a \$200 down payment, Inmi-Etti returned to Nigeria, entrusting the cash balance of the purchase price to her sister. In a few weeks, the car came in, the sister paid the balance of the purchase price for Inmi-Etti, and the car was delivered to a sister's home pending shipment to Nigeria. However, Butler took the automobile, claiming that he was entitled to the car because Inmi-Etti owed him some money. He filed a suit against Inmi-Etti, and obtained a default judgment for these alleged amounts owed to him, and sought to execute against the car to satisfy the judgment. This judgment was later set aside, but between obtaining the judgment and receiving notice that it had been set aside, Butler sold the car to a local car dealer, Pohanka, for the discount price of \$7,200. Pohanka turned around and sold the car to another purchaser for \$8200. Inmi-Etti brought a suit for conversion against Butler and Pohanka. (The defendant Aluisi is the County Sheriff who levied on the car on behalf of Butler).

### **ROBERT L. KARWACKI, Judge:**

~At common law the maxim was: "He who hath not cannot give (*nemo dat qui non habet*). " Black's Law Dictionary 935 (5th ed. 1979). Although at times the Uniform Commercial Code may seem to the reader as unintelligible as the Latin phrases which preceded it, we find in § 2-403 of the Code a definite modification of the above maxim. That section states:

- (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. . . .

In short, the answer to the appellant's claim against Pohanka depends on whether Butler had "void" or "voidable" title at the time of the purported sale to Pohanka. If Butler had voidable title, then he had the power to vest good title in Pohanka. If, on the other hand, Butler possessed void title (*i.e.*, no title at all), then Pohanka received no title and is liable in trover for the conversion of the appellant's automobile. Preliminarily, we note that there was no evidence that Butler was a "merchant who deals in goods of that kind" (*i.e.* automobiles). Md. Code, *supra*, §§ 2-403(2) and 2-104(1). Therefore the entrustment provisions of §§ 2-403(2)-(3) do not apply.

It has been observed that:

Under 2-403, voidable title is to be distinguished from void title. A thief, for example, "gets" only void title and without more cannot pass any title to a good faith purchaser. "Voidable title" is a murky concept. The Code does not define the phrase. The comments do not even discuss it. Subsections (1)(a)-(d) of 2-403 clarify the law as to particular transactions which were "troublesome under prior law." Beyond these, we must look to non-Code state law.

J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 3-11 (2d ed. 1980) (footnote omitted). White and Summers further explain that: subsection (a) of § 2-403(1) deals with cases where the purchaser *impersonates* someone else; subsection (b) deals with "rubber checks"; subsection (c) deals with "*cash sales*"; and subsection (d) deals with cases of *forged checks* and other acts fraudulent to the seller. *Id.* None of these subsections apply to the facts of the present case and we, therefore, must turn to "non-Code state law" to determine whether Butler had voidable title.

Hawkland, *supra*, § 403:04, suggests that "voidable title" may only be obtained when the owner of the goods makes a voluntary transfer of the goods. He reaches that conclusion from the Code definitions of the words "delivery" and "purchase" and summarizes:

Section 2-403(1)(d) does not create a voidable title in the situation where the goods are wrongfully taken, as contrasted with delivered voluntarily because of the concepts of "delivery" and "purchaser" which are necessary preconditions. "Delivery" is defined by section 1-201(14) "with respect to instruments, documents of title, chattel paper or securities" to mean "voluntary transfer of possession." By analogy, it should be held that goods are not delivered for purposes of section 2-403 unless they are voluntarily transferred. Additionally, section 2-403(1)(d) is limited by the requirement that the goods "have been delivered under a transaction of purchase." "Purchase" is defined by section 1-201(32) to include only

voluntary transactions. A thief who wrongfully takes goods is not a purchaser within the meaning of this definition, but a swindler who fraudulently induces the victim to voluntarily deliver them is a purchaser for this purpose. This distinction, reminiscent of the distinction between larceny and larceny by trick made by the common law, is a basic one for the understanding of the meaning of section 2-403(1)(d).

Hawkland later states that the above language applies generally to § 2-403(1) and not merely to subsection (1)(d). *See* Hawkland, *supra*, §§ 2-403:05. The following cases and, indeed, (a) through (d) of §§ 2-403(1) seem to support Hawkland's theory that only a voluntary transfer by the owner can vest "voidable title" in a "person." In *Mowan v. Anweiler*, 454 N.E.2d 436 (1983) the Court of Appeals of Indiana held that the purchaser of an automobile gained title from his seller who had purchased the car with a bad check and then declared bankruptcy. The transfer from the original owner to the bankrupt seller was clearly voluntary. That same court in *McDonald's Chevrolet, Inc. v. Johnson*, 176 Ind. App. 399, 376 N.E.2d 106 (1978), held that the purchaser of a motor home obtained no title because the motor home was stolen from its original owner by a person who was renting it for a short period of time. The court reasoned that the thief possessed void title (even though at the time of the theft he was in lawful possession), and his transfer to the defendant could not convey good title. Therefore, the plaintiff could recover for the defendant's breach of warranty of title. Another point of interest to the case *sub judice* was the fact that the defendant in *McDonald's Chevrolet* received from the thief, his seller, a facially valid title certificate. The court specifically noted that the defendant's diligence in checking the title and his status as a good faith purchaser were "not determinative" since his seller did not possess "voidable title."

In *Allstate Ins. Co. v. Estes*, 345 So.2d 265 (1977) the Supreme Court of Mississippi held that a good faith purchaser for value could not obtain title to an automobile from his transferor. The court explained:

Appellee contends that the facially valid Mississippi title, ultimately based upon an Alabama tag receipt issued pursuant to a forged bill of sale, resulted in "voidable title" in Howard [appellee's seller] with its concomitant power. The appellant, Allstate Insurance Company, who obtained valid title subsequent to paying the Florida dealer's loss, contends its ownership was unaffected by the intervening good faith "equities" of Estes [the appellee].

The dictate of Section 75-2-403 is clear. Regardless of the number of transactions, one cannot remove himself from the confines of the rule: A purchaser can take only those rights which his transferor has in the subject



goods; a thief has neither title nor the power to convey such. *Gurley v. The Phoenix Ins. Co.*, 233 Miss. 58, 101 So.2d 101 (1958). Accordingly, title remained in Allstate and the circuit court order granting possession to Estes was erroneous.

*Id.* at 266.

In *Schrier v. Home Indemnity Co.*, 273 A.2d 248 (D.C. App.1971) the District of Columbia Court of Appeals held that "voidable title" could only be obtained by "persons who have been entrusted with the possession of the goods they sell by consignors, creditors with unrecorded security interests, and certain other kinds of bailors." *Id.* at 250 (citation and footnote omitted). That court continued: "But a possessor of stolen goods, no matter how innocently acquired, can never convey good title." *Id.*

Without attempting to specify all the situations which could give rise to a voidable title under § 2-403 of the Uniform Commercial Code, we refer to the above authorities to support our conclusion that voidable title under the Code can only arise from a voluntary transfer or delivery of the goods by the owner. If the goods are stolen or otherwise obtained against the will of the owner, only void title can result.

Under the undisputed facts of the present case Butler possessed void title when Pohanka dealt with him. Although the record simply is not sufficient for us to decide whether Butler actually stole the appellant's vehicle, it is undisputed that the appellant at no time made a voluntary transfer to Butler. Thus, Pohanka obtained no title, and its sale of the vehicle constituted a conversion of the appellant's property. We believe the above analysis sufficient to impose liability upon Pohanka. . . .

Implicit in all that we have said so far is the fact that Butler did not obtain title (voidable or otherwise) merely from the fact that he was able to convince the Motor Vehicle Administration to issue a certificate of title for the automobile to him [which he obtained through a falsified affidavit after having delivered the car to Pohanka.] Although "[a] certificate of title issued by the Administration is prima facie evidence of the facts appearing on it," Md. Code (1977, 1984 Repl. Vol.), § 13-107 of the Transportation Article, the erroneous issuance of such a certificate cannot divest the title of the true owner of the automobile. *Metropolitan Auto Sales v. Koneski*, 252 Md. 145, 249 A.2d 141 (1969); *Huettner v. Sav. Bank of Balto.*, 242 Md. 477, 219 A.2d 559 (1966); *Lawrence v. Graham*, 29 Md. App. 422, 349 A.2d 271 (1975).

Likewise, we find unpersuasive Pohanka's argument that since Butler had possession of the automobile and a duly issued certificate of title in his name, Pohanka should be protected as a "good faith purchaser for value" under § 2-

403 of the Commercial Law Article, *supra*. Such status under that section of the Uniform Commercial Code is relevant in situations where the seller (transferor) is possessed of voidable title. It does not apply to the situation presented by the instant case where the seller had no title at all. *McDonald's Chevrolet*, 376 N.E.2d at 109-110. . . .

Accordingly, we shall reverse the summary judgment in favor of Pohanka and enter judgment in favor of the appellant against Pohanka for \$ 8,200, an amount representing the agreed fair market value of the appellant's automobile at the time of its conversion. . . .



### 23.5A.1 Question regarding *Inmi-Etti v. Aluisi*

Does Pohanka have any remedy? Hint: review UCC § 2-312(1)(a).

☑ **Purple Problem 23-1.** Claude inherited a valuable piece of western art from his aunt. While packing his aunt's belongings after her death, the painting was inadvertently placed in a box of goods to be donated to the Salvation Army. Without realizing that the painting was in the box, Claude dropped off the box at the Salvation Army. After unpacking all of the boxes a few weeks later, Claude realized the painting was missing, tracked it down to the Salvation Army, and sought its return. However, the Salvation Army had sold the painting to Bob for \$25.00. Did the Salvation Army have void or voidable title? (This problem tracks the facts of *Kenyon v. Abel*, 36 P.3d 1161 (Wyo. 2001), which awarded the painting to the inheritor.)

**23.6. Good Faith Purchaser for Value.** Read UCC § 2-403. If a person acquires voidable title, for example, by use of trickery against the rightful owner, and that person then transfers the goods to a good faith purchaser for value, the good faith purchaser for value acquires good title, and cuts off the original owner's rights to the goods.

23.6.1. "Good faith" is defined at § 1-201(b)(20) as "honesty in fact and the observance of reasonable commercial standards of fair dealing."

23.6.2. "Purchaser" is defined at § 1-201(b)(30) as a person who takes by "purchase," which is defined at § 1-201(b)(29) to include taking by sale, lease,

discount, negotiation, mortgage, pledge, lien, security interest, issue, gift, or any other **voluntary** transaction creating an interest in property.

23.6.3. “Value” is defined at § 1-204 to include “any consideration sufficient to support a simple contract.”

23.6.4. There is a lot of litigation over what constitutes a “good faith purchaser for value.” For example, what if someone offers to sell to you for \$2,000 a painting which you know is worth \$20,000. Should the bargain price put you on notice that there may be problems with the title to the painting? What constitutes “good faith” was considered in *Hollis v. Chamberlin*, 419 S.W.2d 116 (Ark. 1967). Joe purchased a new pick-up camper top from a local dealer, and paid for it with a \$1750 check that bounced, thus acquiring “voidable title.” Joe then took the camper to another dealer, and sold it to that dealer for \$500 cash. Joe advised the second dealer that he wanted to sell the camper because it did not fit properly on his truck, and it obviously did not. It was not even tied down. The camper looked new. No questions were asked as to why it was not tied down. Joe had no bill of sale. The court felt that there were “facts and circumstances which were calculated to have aroused ... curiosity” as to ownership of the camper, stating “[i]nadequacy of the price, when very great, is of itself evidence ... of an infirmity in [the] seller's title and consideration is to be given it, in connection with other circumstances, in determining whether a buyer is a purchaser without notice.” *Id.* at 119. The court concluded that the second dealer was not a “good faith purchaser for value,” and thus he did not acquire “good title” but “voidable title,” against which the original dealer prevailed.

**23.7. Entrustment.** What if you take your skis to the ski shop for waxing, and an inexperienced employee sells the skis to a customer in the store who wants to buy a good pair of used skis. Does the purchaser acquire good title? This situation is governed by UCC § 2-403(2). When goods are entrusted to a **merchant** who **deals in goods of that kind**, the merchant has the power to transfer all rights of the owner to a **buyer in ordinary course of business**.

23.7.1. Notice that this only applies when you have entrusted goods to a merchant who deals in goods of that kind. So if I take my skis to a friend to be waxed, the friend, not being a merchant of skis, has no power to transfer title to my skis.

23.7.2. The purchaser must be a “buyer in ordinary course of business,” which is defined at § 1-201(b)(9) as a “person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of

selling goods of that kind.” In other words, the goods have to look like the regular inventory of the seller.

23.7.2.1. Notice the exclusion of purchases from “pawnbrokers.” You cannot qualify as a “buyer in ordinary course of business” when buying at a pawn shop, presumably because everyone knows that thieves often try to sell stolen goods through pawn shops.

23.7.3. The statute says that the entruster has the *power* to transfer title, not the *right* to transfer title. Therefore, the person who left his or her skis at the ski shop has a claim against the ski shop itself, but not against the person who bought the skis in ordinary course of business from the ski shop.

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